WHAT IS AN ADVERSE ACTION? WELL, IT DEPENDS...

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Burlington Northern v. White – Title VII retaliation analysis

- Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

This is by far the most important employment law case this year!

Employees have long awaited direction from the Supreme Court on what constitutes an "adverse employment action" in the retaliation context especially given the disagreement among the lower courts on this topic.

Indeed, retaliation claims are a large part of employment discrimination law. In the early 1990's some 15.3% of all illegal discrimination charges filed with the EEOC alleged retaliation. By 2005, that had almost doubled to 29.5%. That is worth a moment's reflection: Forty years after invidious discrimination in employment was outlawed, almost one in three EEOC complaints allege retaliation for protesting that illegality, either in addition to some underlying discrimination or independent of it. Such statistics demonstrate the need to broaden and better enforce the laws designed to present retaliation for reporting possible illegal or unlawful procedures in the workplace.

In New Jersey, the trend in the legislature and courts has been to broaden the anti-retaliation laws and to strengthen remedies available. Just before leaving office, Governor Richard Codey signed into law an amendment to the Conscientious Employee Protection Act (first passed as a bill by the Senate in November 2004). The new law enhances the scope of CEPA by specifically assuring protection to employees who blow the whistle on Enron-type

internal fraud. Additionally, the remedy provisions of CEPA were expanded. For instance, CEPA claims are exempted from the Punitive Damages Act. Finally, as will be discussed below, the New Jersey State courts have progressively interpreted anti-retaliation laws such as CEPA in a liberal manner in order to afford employees the protections intended by such laws.

The Supreme Court's recent pronouncement on what constitutes an "adverse employment action" similarly reflects Congressional and legislative intent to protect the litigation and enforcement process, *i.e.*, courts, EEOC, and employees who protest, against employer interference. Accordingly, the Court ruled that an employer's actions are adverse employment actions if they are harmful to the point that they could well "dissuade a reasonable worker from making or supporting a charge of discrimination."

The Third Circuit has defined an adverse employment action as one that is **"serious and tangible enough to alter an employee's compensation, terms and conditions, or privileges of employment."** Cardenas v. Massey, 269 F. 3d 252, 263 (3d Cir. 2001)(quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

Oral reprimands and derogatory comments do not qualify as adverse employment actions for purposes of establishing a *prima facie* case of retaliation. Id. at 1301. Similarly, a "purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996), cited with approval in Robinson, 120 F. 3d at 1301.

Indeed, the Third Circuit has adopted the standard set forth by the Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 761-62 m141 L.Ed. 2d 633, 118 S.Ct. 2257 (1998); in defining an adverse employment action. ***Remember***: the Ellerth standard was developed to define and distinguish those acts of *discrimination* (not retaliation) which were or were not subject to certain affirmative defenses.

The Supreme Court held that an employee who had suffered an adverse employment action prevented an employer from raising the affirmative defense that the employer had an effective remedial anti-discrimination policy in place and that the plaintiff failed to avail herself of those remedies in order to defeat vicarious and direct liability. Id.

In Tucker v. Merck & Co., Inc., 131 Fed. Appx. 852, 855 (3d Cir. 2005), the court noted that the Supreme Court defined an adverse employment action as:

> "A tangible employment action constitutes a significant change in employment status, such as firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits... A tangible employment action in most cases inflicts economic harm."

A "tangible" employment action is different, however, than an "adverse" employment action. "Tangible" is defined as "material, substantially real, concrete, capable of being precisely identified or realized by the mind." "Adverse" is defined as "hostile, opposed to one's interest, causing harm, opposite in position." *Merriam Webster Dictionary*, 2006 Ed. The two concepts simply have different meanings.

The ruling in the *Burlington* case is a huge victory for workers because the Supreme Court has finally, and appropriately, relaxed the standard for evaluating whether conduct is sufficiently severe to support a retaliation claim. The standard for evaluating adverse employment actions adopted by the Third Circuit has been overruled. It no longer applies. A more modern and less restrictive approach has been announced by the Supreme Court in Burlington.

In Burlington, the justices first expanded the concept of "adverse employment action" to include conduct occurring outside the workplace. The Court then adopted a broad test

for evaluating whether conduct is retaliatory – a standard that does *not* require the alleged retaliatory act to directly impact a term or condition of employment. Rather the Court held that the anti-retaliatory provision prohibits ***any materially adverse treatment by an employer, either on or off the job, which is reasonably perceived by the employee as being related to a previously made complaint.***

Basic Rule:

"We conclude that the anti-retaliation provision (Section 704) does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. Burlington Northern v. White, 126 S. Ct. 2405, 2407 (2006). We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 2409. (Court adopted the EEOC standard).

- **No link to employment needed.**
- Unlike Title VII's basic anti-discrimination section (703), the anti-retaliation section (704) has **different language** and a **different purpose**. Section 703 prohibits discrimination with respect to conditions of employment, but Section 704 has "no such limiting words." Section 703 prevents injuries based on who people are (*i.e.* based on sex, race, etc.) while Section 704 is based on what people do (e.g. filing an EEOC charge or complaining to management). Limiting Section 704 retaliation to employer actions that are work-related or employment related would not achieve Section 704's purpose.
- **Material Adverse Action.** In order to "separate significant from trivial harms, "the Court requires

the employee to show that the employer's action was "materially adverse." This will exclude "petty slights or minor annoyances."

- **Reaction of a Reasonable Employee**. The Court adopted an objective standard, so an individual employee's "unusual subjective feelings" will not be relevant. The focus is on the materiality of the employer's action and the "perspective of a **reasonable person in the plaintiff's position."**

Examples:

- **Changed job duties.** In the *Burlington* case, the employer changed the employer's duties, however the duties were still within her job description. The job description did not matter. What mattered was that the new job was dirtier, harder, less prestigious, and perceived by other employees as being worse. (White was working as a fork lift operator, and the employer transferred her to work as a standard track laborer).
- **Temporary Suspension.** In the *Burlington* case, the employee was suspended for 37 days, and then reinstated with back pay. The Court said a reasonable person would find that a month without a paycheck is a "serious hardship."
- **Schedule Change.** Might not matter to many employees, but may matter "enormously to a young mother with school age children."
- **Refusal to Invite to Lunch.** Usually trivial, but exclusion from a weekly training lunch might well deter a reasonable person from complaining.

Treatment of Other Discrimination/Retaliation Claims

Since the federal courts have evaluated "adverse employment actions" under Title VII in the same manner as the LAD, the ADA,

ADEA and 42 USC Section 1981 claims, the analysis for evaluating an adverse employment action under any of these causes of action will be governed by the standard set forth in Burlington Northern. *See*, Davis v. The City of Newark, 2006 U.S. Dist. LEXIS 63308, decided August 31, 2006 (*case dismissed since plaintiff failed to establish a prima facie case of race discrimination under Title VII or the LAD because she could not demonstrate that she suffered an adverse employment action which was defined as an action that "must be sufficiently severe as to alter the employee's compensation, terms, conditions or privileges of employment, or deprive or tend to deprive her of employment opportunities or otherwise adversely affect her status as an employee."*29);* Foster v. Ashcroft, 2006 U.S. Dist. LEXIS 47896, July 14, 2006 (*court dismissed race retaliation claim finding that plaintiff did not suffer an adverse employment action as a result of a negative performance evaluation which did not "tangibly alter the terms and conditions of employment.");* Speer v. Norfolk Southern Railway Corp., 121 Fed Appx. 475 (3d Cir. 2005)(*ADA claim dismissed on finding that plaintiff did not suffer an adverse employment action);* Langley v. Merck & Co., 2006 U.S. App. LEXIS 14958, June 15, 2006 (*plaintiff's Section 1981 race discrimination case dismissed upon finding that reassignment of position after company reorganization did not constitute an adverse job assignment);* Igwe v. DuPont De Nemours & Co, Ic, 2006 U.S. App. LEXIS 11801, May 8, 2006, (*Title VII and Section 1981 race discrimination dismissed where no dispute that transfer and demotion were adverse employment actions but no evidence of discriminatory animus);* Deiser v. Gloucester County, 2006 U.S. Dist. LEXIS 13614, March 29, 2006, (*Sheriff officer's temporary reassignments were duties he could expect to perform as part of his job and therefore not considered adverse; court did not consider reassignments to be harassing and dismissed case).*

Treatment of Other Retaliation Claims

Whistleblower Cases

In Nardello v. Township of Voorhees, 377 N.J. Super. 428 (App. Div. 2005), the Appellate Court reversed summary judgment

dismissing plaintiff's complaint under New Jersey's Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1, et. seq. In reversing, the Appellate Court determined that a jury could draw an inference that the plaintiff had suffered a series of adverse retaliatory actions by his employer. The court noted that in 1999, plaintiff obtained the third highest rank in the department—a lieutenant. Id. at 436. As a lieutenant, he was in charge of the SWAT team. Id. Plaintiff set forth several instances beginning in 1999 where he was forced to inform superiors of cover ups and alleged misconduct. Because of this, plaintiff claimed that he suffered adverse employment actions, such as: being denied permission to obtain firearms instructor training relative to his membership on the SWAT team; coerced to resign as leader and a member of the SWAT team; denied the ability to work on crime prevention programs; and removed from the detective bureau, with his authority to supervise taken away. He also claimed that he was given demeaning jobs for his rank. Id.

The Court acknowledged that the plaintiff suffered no reduction in pay but pointed to the Supreme Court's analysis of cases brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., "the Legislature intended victims of discrimination to obtain redress from mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments." Id.

The court specifically rejected an analysis of plaintiff's claim under a standard that included a requirement of a finding that the adverse employment actions involved a "tangible" action affecting terms and conditions of employment. The Court further pointed to the Supreme Court's holding in Green v. Jersey City Bd. of Ed., 177 N.J. 434 (2003), wherein the court noted that "many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that may combine to make up a pattern of retaliatory conduct" may constitute an adverse employment action under CEPA. Id. at 448.

It appears that in light of the relaxed standard adopted by the United States Supreme Court in Burlington Northern, the Third Circuit decisions in the future will be more in line with the analysis

and holdings in the State courts on the issue of adverse employment actions under all statutory and common law frameworks for claims of retaliation.